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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 691

ERIE-LACKAWANNA RAILROAD COMPANY,
Appellant,

— against —

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO ADVANCE

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Comes now appellant, Erie-Lackawanna Railroad Company, hereinafter referred to as E-L, and prays that this Court enter an order, pursuant to paragraph 4 of the Court's Rule 43, advancing the case.

In support of this motion appellant respectfully shows as follows:

1. A motion to advance has already been made by the appellants in *Baltimore and Ohio Railroad Company, et al.*,

Appellants, v. *United States of America, et al., Appellees*, which is another appeal from the same order of a three-Judge District Court in the Southern District of New York. E-L is generally in accord with the reasons given in said motion to advance, although E-L has reservations as to the second and third sentences in paragraph 4 of said motion.[1] E-L's position is stated herein without duplicating what is contained in the balance of said motion.

2. The Commission has ordered that the further hearing provided for in its Report of September 16 commence

[1] The reference in said motion to advance to "J.S., pp. A-15, A-16" should be to pages A-18 and A-19, which contain the pertinent portions of what is to be found on pages 15 and 16 of the majority opinion in its typewritten form as filed.

The second sentence to which we refer reads as follows:

> "The court below recognized that the legal issues must be decided before consummation of Penn-Central, and undertook to decide these issues in denying the motions for interlocutory injunction."

The cited portion of the majority opinion below certainly reads as if the majority considered the decision to deny an interlocutory injunction virtually equivalent to a decision on the merits in favor of the defendants. However, we do not find anything in the opinion which indicates that the Court deliberately determined to reach the equivalent of a decision on the merits on all issues, and the majority opinion contains a great deal about the "four factors to be considered in determining whether to stay the order of an administrative agency pending full review" (p. A-16), which could be cited as indicating that the Court looked upon the motions for an interlocutory injunction as not involving a decision on the merits on all issues.

The third sentence relates to the necessity of a decision by this Court, before the Penn-Central merger is consummated, of the questions presented on the appeal taken by the appellants, *Baltimore and Ohio Railroad Company, et al.* E-L's interests are not identical with those of the B&O and its co-appellants. E-L does not endorse the third sentence and considers that it would be unsuitable to discuss the legal issues to which the third sentence refers.

on October 31, 1966 (Appendix C to Jurisdictional Statement in *Baltimore and Ohio Railroad Company, et al.* v. *United States of America, et al.*). The commencement and conduct of that hearing has not been stayed by the temporary restraining order issued by the three-Judge Court which is now in effect, and would not be stayed by such a stay as E-L requested in its application to Mr. Justice Harlan, which has now been referred to the full Court, since E-L asked only for a stay of the consummation of the merger. Progress can thus be made simultaneously in this Court and before the Commission. If this Court reverses the three-Judge Court, the further hearing before the Commission can be treated as having been held upon a remand to the Commission prior to consummation of the merger. If this Court should affirm the three-Judge Court, the further hearing before the Commission and the entry of orders as a result thereof will not have been prevented.

3. The interests of E-L and its connections, and of "the shipping public which depends upon [E-L] for transportation" (327 I.C.C. at 563; Section 8 of Appendix G), might perhaps be as well served by the granting of a stay of the consummation of the merger until after the disposition in the normal course of the appeals from the order of the three-Judge Court without any of such appeals having been advanced. However, after careful consideration E-L believes that the public interest and the administration of justice will be better served if the appeals from the order of the three-Judge Court be advanced.

WHEREFORE, appellant prays that the Court enter an order advancing E-L's appeal, and that the order contain such provisions as the Court may deem appropriate with

respect to other appeals from the order of the three-Judge Court, the filing of briefs, and oral argument.

October 17, 1966.

Respectfully submitted,

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